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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HARVEY B. COLLINS,
Petitioner,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS OF THE UNITED STATES, GEORGE WADE, SR., AUBREY TODMAN, LUTHER BENJAMIN, CLIFFORD BENJAMIN and "JOHN DOE" a Person, Association or Incorporation, being a fictitious name, jointly, severally and in the alternative,
Respondents.

No. 951

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion of the Court of Appeals is reported at 366 F. 2d 279 (3rd Cir. 1966). The opinion of the District Court is reported at 236 F. Supp. 441 (1964).

Questions Presented

1. Whether a party in a civil case can rely on a timely demand for a jury trial made by another defend-

ant who was dropped as a party immediately before trial, where such initial demand was not limited to specific issues.

2. Whether the defendant's subsequent participation in a trial after raising objections to the denial of a jury demand constitutes a waiver of a right to a jury trial.

Statutes and Rules Involved

Rule 38 of the Federal Rules of Civil Procedure provides in part:

> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.
>
> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Rule 39 of the Federal Rules of Civil Procedure provides in part:

> "(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.
>
> "(b) By The Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues."

Act No. 921 of the Fifth Legislature of the Virgin Islands of the United States, approved January 25, 1963, provides:

> "To Consent to the Institution of an Action in Court Against the Government of the Virgin Island by Harvey B. Collins, in Connection With Personal Injuries Sustained by Harvey Collins.
>
> "Be it enacted by the Legislature of the Virgin Islands:
>
> "Section 1. Harvey B. Collins is authorized to file suit against the Government of the Virgin Islands on his claim for losses arising out of injuries sus-

tained on February 4, 1961, as a result of an automobile accident as to which Harvey B. Collins alleges the Government of the Virgin Islands to be liable.

"Section 2. For the purpose of this Act and the adjudication of any such claim, the immunity of the Government to suit is hereby waived and Harvey B. Collins may proceed against the Government as in the case of any other defendant, subject to the same procedures and defenses except for the defense of immunity from suit or of the statute of limitations, the provisions of which are hereby expressly waived; Provided, That nothing contained herein shall be construed as an admission of liability on the part of the Government.

"Section 3. The Claimant, Harvey B. Collins, shall commence the action authorized by this Act within two months from the effective date of this Act.

"Section 4. This Act shall take effect upon its approval."

Statement

Respondent adopts as its statement of the facts material to the consideration of the questions here presented the summary of the facts contained in the opinion of the Court of Appeals.[1]

Reasons for Denying the Writ

The Court of Appeals has correctly decided that the Government of the Virgin Islands was entitled to a jury trial by virtue of the timely demand for such trial by another defendant.

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[1] See Pet. App. A. pp. 1a through 5a and 336 F. 2d 279.

The Appellant's contention that this decision of the Third Circuit Court of Appeals is in conflict with the decision of the Ninth Circuit in the case of *United Press Association* v. *Charles,* 245 F. 2d 21 (9th Cir.) cert. denied 77 S. Ct. 1378 (1957) is clearly erroneous. This case cited by petitioner, when rightly understood, is direct authority for allowing a jury trial. The basic question presented in *United Press Association* v. *Charles, supra,* was whether the Court could grant to a defendant a jury trial *sua sponte.* In that case neither plaintiff nor defendant asked for a jury trial within ten days after the issues were made. Thereafter defendant filed a motion for jury trial, which motion was denied. Subsequently the trial judge entered an order directing jury trial *sua sponte.*

The Court stated:

> "There is no express prohibition of jury trial in the Constitution, treaties or laws of the United States. There is no express denial of the right of a trial judge to call a jury in any civil trial in the Federal Rules of Civil Procedure." *Id* at 23.

It is further said in that opinion:

> "Had the Rules contained any express prohibition of jury trial under any set or circumstances, it is probable that the Supreme Court of the United States would not have adopted such provisions, and it is equally probable that Congress would not have approved them." *Ibid.*

Thus, *United Press Association* v. *Charles, supra,* clearly emphasizes the unquestionable custom of the trial courts to grant a jury trial where the situation has

demanded it, even when none of the parties made a timely demand for such trial or where there has been a waiver by the parties. See, e. g., *Arnold* v. *Trans-American Freight Lines, Inc.*, 1 F. R. D. 380 (S. D. Mich. 1940). Moreover, public policy often compels the granting of a jury in a law case in the face of waiver by the particular parties. *Rodenbur* v. *Kaufman*, 320 F. 2d 679 (D. C. Cir. 1963); *Supplies, Incorporated* v. *Aetna Casualty & Surety Co.*, 18 F. R. D. 226 (W. D. Pa. 1955); *Ohlinger's Federal Practice*, p. 524. Also Rule 39(b) of the *Federal Rules of Civil Procedure* provides in part:

> "... notwithstanding the *failure of a party to demand a jury* in an action in which such a demand might have been made of right, the court may order a trial by jury ..." (emphasis added)

Accordingly, respondent submits that in *United Press Association* v. *Charles* neither party made a timely demand for a jury trial whereas in the instant case a timely demand was made by a party to the action.

The Government of the Virgin Islands was entitled to rely on the jury demand made by another defendant. Defendant Benjamin filed his answer to the plaintiff's complaint on March 7, 1963 and at that time made a demand for a jury trial.

Thereafter, on March 28, 1963 the Government filed its answer and did not make its own demand. Its failure to demand a jury trial was predicated upon its reliance on the prior demand made by defendant Benjamin. Moreover, if the Government had been the first to file its answer to the plaintiff's complaint

and had then failed to demand a jury trial, the petitioner more appropriately might have argued that its failure to file such a demand for jury trial constituted a waiver. In 5 Moore Federal Practice, sec. 28.45 at 343-44 (2nd Ed. 1964) it is stated:

> "In other words if a timely demand for jury is made, all other parties in the action who are affected by the demand may rely thereon and need not make a jury demand for issues raised therein."

Likewise, in 2B Barron and Holtzoff, Federal Practice and Procedure sec. 877, at 49 (Wright Ed. 1961) it is said that:

> "Where a timely and proper demand for a jury is made by one party, all of the parties to the action who are interested in the issues as to which jury trial has been demanded may rely thereon and need not make an additional demand of their own."

In this action one of the defendants made a timely demand. This demand by the co-defendant was not limited as to specific issues. It has been stated that the defendant may specify certain issues, and if so, any other party may serve a demand as to other issues, but if the original demand is not so limited, all issues triable by a jury will be deemed covered. *Ring* v. *Spina, et al.*, 166 F. 2d 546 (2nd Cir. 1948); *Wilson* v. *Kennedy*, 75 F. Supp. 592 (W. D. Pa. 1948); 2B Barron and Holtzoff, Federal Rules of Procedure, sec. 871, p. 49.

The Court of Appeals was correct in holding that:

> "Since an intial demand for a jury will cause the designated issues to be docketed for jury action, it becomes superfluous for another party to make

> a similar demand, and hence such a party should be allowed to rely on the initial demand."

This reasoning is in keeping with the purpose and spirit of the Federal Rules of Civil Procedure which was adopted to secure "a just, speedy and inexpensive determination of every action." See Rule 1.

Petitioner contends that the demand made by one defendant cannot aid the respondent because the facts underlying the several legal theories were very different. Petitioner's brief, p. 13. We concur with the Court that the differences asserted by the petitioner are not dispositive of this situation, 366 F. 2d at 285. As the defendant's demand for a jury trial was a general demand, it covered all the issues between the Appellant and all the other defendants, including the issue of contributory negligence. In this connection, the trial court itself had denied appellant's motion to strike the defense of contributory negligence which was raised by both the defendants Benjamin and the Government. Accordingly, the trial court was aware that there existed a common issue as between all the defendants on the one side and the appellant on the other. It is well settled that in determining the essential character of a suit, the entire pleadings and all the issues raised are to be examined and not merely the plaintiff's complaint, petition or evidence. To uphold the appellant's contention would certainly preclude an appraisal of the defense of contributory negligence raised by all the defendants. Moreover, it has been held that a jury trial should not be denied simply because there is no real defense to an action which is

properly triable by a jury. *Jackson* v. *General Finance Corp.*, 253 P. 2d 166 (1953).

It is beyond dispute that the facts to be adduced on the issue of contributory negligence would be the same as to both the Government and the defendant Benjamin. Appellant also recognized that there was a common issue as between the defendant Benjamin and the Government. Appellant's brief, p. 17. *Ergo* the general demand would have embraced all the issues triable by the jury. In *Cataldo* v. *E. I. DuPont De Nemours and Company,* 39 F. R. D. 305 (S. D. N. Y. 1966), the plaintiff sued for injuries caused by an explosion of the defendant's can of lacquer on the theory of negligence and amended his complaint to allege a second cause of action based on a breach of warranty. The Court held that where there will be a jury trial of some of the issues in an action, the court may order a jury trial of all the issues in that action. Also in *Consolidated Fisheries Co.* v. *Fairbanks Morse & Co.,* 9 F. R. D. 539 (E. D. Pa. 1949) the court held that the plaintiff was entitled to a jury trial of the issues raised by the counterclaims and reply where such issues arose out of the same transaction, which was the subject of the amended complaint thus entitling the plaintiff to a jury trial on all the issues. The Court reasoned that since much of the evidence would be the same on the trial of the issues, the District Court could grant a jury trial of all of the issues.

In the case at bar this action was commenced by a single complaint against the Government and other defendants charging them jointly and severally liable for the same injury to the plaintiff. As the injury

arose out of the same occurrence, certainly the same evidence as to negligence and contributory negligence would be relevant to all the parties involved.

It is undeniable that a personal injury action involves legal issues which are cognizable in a court of law. Accordingly, the holding of the Court of Appeals is in accord with the ruling in *United States* v. *Pfitsch,* 256 U. S. 547 (1921), where it has been asserted that a grant of jurisdiction to the District Court recognizable at law carries with it a right to jury trial. See also *DePinto* v. *Provident Security Life Insurance Co.,* 323 F. 2d 826 (9th Cir. 1963) cert. denied 376 U. S. 950 (1964). With perhaps a few exceptions, trial by jury has always been and still is, regarded as the normal preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. *Dimick* v. *Schiedt,* 293 U. S. 474, 79 L. Ed. 603 (1935). It is entirely proper for the jury to determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.

Concerning the right to jury trial it has been well established that courts will indulge every reasonable presumption against waiver. *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389, 393; 81 L. Ed. 1177 (1937); *Beacon Theatres* v. *Westover,* 359 U. S. 500, 510, 3 L. Ed. 2d 988 (1959).

It has also been stated:

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick* v. *Sch-*

redt, 293 U. S. 474, 486, 79 L. Ed. 603;" *Beacon Theatres, Inc.* v. *Westover, supra.*

We submit that in the instant case there was never a waiver of a jury trial. A waiver of right to a jury trial must of necessity be an intentional act. *Hoover* v. *Abell,* 231 S.W. 2d 217 (1950); *Burke Grain Co.* v. *St. Paul-Mercury Indemnity Co.,* 94 F. 2d 458 (8th Cir. 1938). Certainly, the Government's conduct to operate as a waiver of the right to a jury trial must be inconsistent with the rights already asserted; to wit, reliance on the written demand of defendant Benjamin, and the motion made by the Government at the commencement of the trial.

The failure to make a timely claim, Federal Rules of Civil Procedure, 38(d) is limited by the explicit provision of Federal Rules of Civil Procedure 39(a) that once a demand for jury trial has been properly made it can be waived by an oral stipulation made in open court and entered in the record by written stipulation. There was certainly no such waiver by the Government in the manner in which the Federal Rules of Civil Procedure prescribes.

The appellant contends that the Government waived its right to a jury trial by proceeding to trial after the trial court denied the demand for a jury trial. It is well established that subsequent participation in a trial after a denial of a demand for a jury trial does not constitute a waiver of a jury trial. See, e. g. *Jackson* v. *General Finance Corp.,* 253 P. 2d 166 (1953); and *Burke Grain Co.* v. *St. Paul-Mercury Indemnity Co.,* 94 F. 2d 458 (8th Cir. 1938). In the latter case the court held that a defendant did not waive his right to

a jury trial in a federal court by requesting special findings by the court and excepting to those proposed by the plaintiff after the court had denied the defendant a jury trial and therefore was not precluded from complaining of a denial of a jury trial.

In addition, an order denying a jury trial is interlocutory and not appealable, although it is subject to appellate review later after a final judgment is entered in the case. *Black* v. *Boyd,* 248 F. 2d 156, 159 (6th Cir. 1957); *In re Chappell and Co.,* 201 F. 2d 343 (1st Cir. 1953); *Blaunit Mills, Inc.* v. *Eday Fabric Sales Corporation,* 124 F. 2d 563 (2nd Cir. 1942). Furthermore, the situation is analogous to that presented where both sides move for a directed verdict but one of them asks that the issues be submitted to the jury if motion is denied. In such case it is well settled that a party does not waive the right to go to the jury by joining in the motion to the court. *Peterson* v. *Sucro,* 93 F. 2d 878 (4th Cir. 1938); *Starfed Properties, Inc.* v. *Ettinger,* 131 F. 2d 575 (2d Cir. 1943).

Here the defendant Benjamin was actively engaged in the litigation until the morning the trial was to commence. While the jury was in the courtroom, the appellant moved to dismiss the action against all parties except the Government. The Court informed the Government for the first time that the case would be tried without a jury despite the Government's protest. The Government then filed a Motion for Jury Trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure and indicated that it had relied on the timely demand for a trial by jury made by the defendant Benjamin. See 366 F. 2d at 281. In view of these cir-

cumstances surrounding the denial of the Government's demand for a jury trial and in light of the weight of authority, the position of the appellant that the Government should have refused to participate in the trial proceeding lacks merit. His contention certainly warrants the application of the statement of the Court in *United Press Association* v. *Charles, supra,* that: "Medieval scholasticism could furnish no more pedantic example of the disregard of actuality in pursuit of logic." *Id* at 26.

It is clear that had the defendant Benjamin not been dropped from the case there would have been no question of the entitlement of the Government of the Virgin Islands to a jury trial. The mere fact that the defendant Benjamin was dropped just before trial should not militate against the grant of this fundamental privilege to the Government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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